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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE C. WALLACE, Governor of the State of Alabama, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

DOUGLAS T. SMITH, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

Appellants Douglas T. Smith, et al. move this Court for leave to file the attached supplemental brief pursuant to Rule 35(5) and (6) of the Rules of this Court. In support of this Motion, appellants cite the following:

1. During oral arguments of these consolidated cases before this Court on December 4, 1984, several Justices questioned whether this case presented a justiciable controversy for this Court to decide, possibly requiring dismissal.

2. Rule 35(5) allows a party to present intervening matters that were not available in time to have been included in his brief in chief.

3. Due to the misstatement of counsel during oral arguments which called into question the existence of a justiciable controversy in this case, appellants petition this Court for an opportunity to call the attention of the Justices to evidence which counsel were not familiar with during oral arguments in addition to the brief quotation from the Transcript (T. 184-85), which Appellants Smith transmitted to this Court by letter to the Clerk dated December 5, 1984.

4. In view of the extreme importance of this case and since this issue had never been raised before in the appellate courts to permit briefing, appellants also ask this Court for leave to present cases which this Court has decided which shed light on whether the instant case presents a case or controversy within the meaning of article III, section 2 of the United States Constitution.

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SUPPLEMENTAL BRIEF OF APPELLANTS, DOUGLAS T. SMITH, ET AL.

During oral arguments in this case, Justices White and Stevens questioned whether a justiciable controversy existed as to ALA. CODE § 16-1-20.1 for the following reasons:

1) there was no evidence in the record as to the practice of a moment of silence in the public schools of Alabama, and

2) the statute had not specifically been implemented prior to the trial of this case.

A. Evidence of the Practice of a Moment of Silence

Subsequent to oral arguments, counsel for Appellants Smith pointed out to this Court by letter of December

5, 1984, addressed to the Clerk of this Court, that an error had been made in representations to this Court as to the first assumption above. In fact, there was evidence in the record as to the practice of a moment of silence for permissive prayer or meditation. Julia Green, defendant in *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983) (J.S.A. 1d),[1] had testified at trial to the following:

> A. . . . I returned on Monday and I did not let the children say the grace. And the children questioned me. "Mrs. Green, why not, why not? And, I said, "Say it to yourselves. . ."
>
> Q. Do you feel it is anything wrong with them saying it to themselves?
>
> A. No, not if they want to. . . .
>
> Q. Would you have any problems with the grace being said silently?
>
> A. None whatsoever. . . . [T]his year I said to the children "If you want to—we are not going to do grace. I'll tell you what, say it to yourselves if you want to. If you don't want to, you don't have to."...
>
> Q. When you returned that Monday you did not engage in the saying of grace?
>
> A. No, I did not, but I watched to see what would happen. All of the children, including Aakki, at the table, they bowed their heads and to themselves said their little prayer, including Aakki.
>
> Q. What month was this, May?
>
> A. Correct.
>
> Q. And you have been doing this since September?
>
> A. That's right. (T. 184-85)

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[1] J.S.A. refers to Appendix to the Jurisdictional Statement of Appellants Wallace.

J.A. refers to Joint Appendix.

T. refers to Transcript in the original record.

Based on evidence presented to the trial court, the judge after preliminary hearing found that a justiciable controversy as to the challenged statute existed. *Jaffree v. James*, 544 F. Supp. 727, 730 (1982) (J.S.A. 64d, 68d).[2]

Appellants Smith submit that any lack of evidence as to the practice of a moment of silence should not be determinative of whether a case or controversy exists. In *Murray v. Curlett*, consolidated for on appeal with *Abington School District v. Schempp*, 374 U.S. 203 (1963), this Court held the Rules of the Board of School Commissioners of Baltimore City were in violation of the establishment clause *without any evidentiary record at all.* This Court relied on the pleadings without any finding that the Rules were being applied in a discriminatory way or even that they were being applied to the Murrays. The Murrays' suit for mandamus to compel rescission of the Rules had been dismissed on demurrer by the Board of School Commissioners prior to the taking of evidence. *See Murray v. Curlett*, 228 Md. 239, 179 A.2d 698 (1962).

B. Implementation of the Moment of Silence Statute

As to the second issue raised by the Justices, Appellants Smith refer this Court to the Second Amended Complaint of Appellees Jaffree at paragraphs 32(d) through 32(f) (J.A. 25) and to the statements made by Jaffree's counsel during oral arguments to the effect that the statute was in fact being implemented in Mobile's public schools. Counsel for Jaffree stated during oral arguments that Appellees had been prevented by the trial judge from introducing evidence of specific teachers and instances where this statute was being applied although they sought to do so. (T. 168, 288)[3]

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[2] *See also* references in the transcript to silent prayer at T. 94, 95, 118, 127, 131, 146, 180-81, and 186.

[3] Perhaps counsel for appellees did not recall during oral arguments the testimony of Julia Green referred to above.

[Footnote continued]

This Court, however, has not always required evidence of implementation of a statute in order to find a justiciable controversy exists. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court struck down as an establishment of religion two sections of a New York law aiding non-public schools and upheld three others without any factual record or discovery. Suit was brought "almost immediately after the signing of these measures" by residents and taxpayers of New York, some of whom had children attending public schools. 413 U.S. at 762. "[T]he case was decided without evidentiary hearing. Since the questions before the District Court were resolved on the basis of pleadings, that court's decision turned on the constitutionality of each provision on its face." *Id.* & 413 U.S. at 809 n.5. (Rehnquist, J., dissenting).[4]

Even if this Court were to find that teachers were not conducting a moment of silence under the authority of ALA. CODE § 16-1-20.1, as appellees allege they were, the precedents of this Court indicate that the passage of the statute and the alleged intent of teachers to act under its authority is enough to find that a case or controversy

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[3] [Continued]

It should not be surprising that teachers did not refer specifically to the moment of silence law in their testimony to the trial court in November 1982, as authority for conducting classroom exercises. The district court had enjoined the state from enforcing this statute on August 9, 1982 by preliminary injunction. *Jaffree v. James*, 544 F. Supp. 727 (1982) (J.S.A. 64d). However, the statute was in effect in May of 1982 when defendant Green began her practice of a moment of silence.

[4] *See also Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982), striking down Tennessee's moment of silence statute without the production of any evidence as to implementation of the statute. "Schools were not in session when the hearing in this case was conducted," the trial court noted, relying on the legislative history of the act to find it unconstitutional. *Id.* at 1164.

And *see Epperson v. Arkansas*, 393 U.S. 97 (1968) where there is no evidence that the anti-evolution statute was ever applied.

exists. A mere *intent* to enforce a statute without actual enforcement or implementation was adequate for this Court to find that a case or controversy existed in *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958). Even though the government alleged that it had not done anything or threatened to do anything adverse to the complainant, the Court did not require the complainant to wait until the statute was enforced against it before bringing an action to have the statute declared unconstitutional. *Id.* at 539.[5] And in *Larson v. Valente*, 456 U.S. 228 (1982), this Court also recognized that a case and controversy existed although the statute had never been implemented. The evidence indicates that the Minnesota Department of Commerce had only notified the appellee Unification Church that it was required to register under the newly enacted provisions. *Id.* at 232.

However, where the case involves significant establishment clause issues, this Court has not always required that the record indicate that the government even intended to apply the statute in question. In *Stone v. Graham*, 449 U.S. 39 (1980), this Court apparently relied on representations made in an amicus brief that the statute had been implemented. *See Stone v. Graham*, 599 S.W.2d 157, 159 (Ky. 1980). There is no finding by either court that the statute was being carried out.

This same principle has been applied in other first amendment cases. In *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), the Court permitted petitioner to challenge *on its face* a statute apparently involving prior restraint or censorship of motion pictures. The record is clear that petitioner had not complied with the terms

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[5] A mere plan or intent to act was held adequate to provide a justiciable controversy when the government activity would cause a "chilling effect" to complainants' free speech rights in *Socialist Workers Party v. Attorney General of the United States*, 419 U.S. 1314 (1974).

of the statute or been damaged by the statute's application to it.

In *California v. LaRue*, 409 U.S. 109 (1972), Mr. Justice Douglas, dissenting, noted that the case involved "a challenge of the constitutionality of the California rules *on their face*; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings." *Id.* at 120 (emphasis added). Yet both Justice Douglas and the Court agreed that the case met requirements of a justiciable controversy. The Court relied on a stipulation by the government that they would take disciplinary action against those violating these rules. *Id.* at 113 n.3. The Court added that "a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by appellees," citing *Zwickler v. Koota*, 389 U.S. 241 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); and *Baggett v. Bullitt*, 377 U.S. 360 (1964).[6]

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[6] *See Clements v. Fashing*, 457 U.S. 957 (1982), where this Court held that "the uncontested allegations in the complaint [were] sufficient to create an actual case or controversy." *Id.* at 962. The record as reported by this Court and the court below does not indicate that any evidence was introduced to show that the challenged statute would be enforced against the complainants. The statute was judged on its face only. *Fashing v. Moore*, 489 F. Supp. 471 (W.D. Tex. 1980); *Moore v. Fashing*, 631 F.2d 731 (5th Cir. 1980).

See also Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974). The Court held there that where a statute will inevitably come into operation, it is irrelevant that there will be a time delay. "One does not have to await the consummation of threatened injury to obtain preventive relief," quoting *Penn. v. W. Va.*, 262 U.S. 553 (1923). *Regional Rail Reorganization Act Cases*, 419 U.S. at 143.

And see *S.C. v. Katzenbach*, 383 U.S. 301 (1966), where this Court held that nothing more than a new amendment to a state voting law was needed to create a case or controversy which would permit a federal court to pass on the constitutionality of the amendment. The amendment need not be applied by the state. The federal court could examine the amendment on its face.

C. Criteria for a Justiciable Controversy

This Court in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) set forth the criteria for determining if a controversy met the requirements of Article III, Section 2 of the United States Constitution, as well as of the Declaratory Judgment Act:

(1) The controversy must be *definite and concrete*, touching the legal relations of parties having adverse legal interests.

(2) It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a *hypothetical state of facts.*

(3) There must be a concrete case admitting of an *immediate and definitive determination* of the legal rights of the parties in an adversary proceeding *upon the facts alleged. Id.* at 240-41.

Appellants Smith argue that the nature of this controversy is concrete. Appellants Jaffree objected to and sought an injunction against all religious activities and instructional materials used in public schools of Mobile County (Complaint at J.A. 11). He further objected to his children being exposed to prayer. (T. 211) Since defendant Julia Green testified that Appellee Aakki Jaffree, who was in her class, participated in a moment of silence for permissive prayer or meditation, Jaffree would object to this activity because of its religious and repetitive nature (T. 247) and because he finds prayer offensive. (Finding of district court in *Jaffree v. James*, 544 F. Supp. at 729) (J.S.A. 67d.)[7]

Appellants also argue that no hypothetical state of facts is alleged. There is no dispute in the record that

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[7] Jaffree's complaint was directed against any repetitive reference to diety (T. 160, 247) even in the context of the Pledge of Allegiance (T. 225, 248). He also objected to the government's publishing a document referring to a citizen's God-given rights (T. 286).

the State of Alabama has enacted § 16-1-20.1 and that public school teachers in Mobile County including the teachers of Appellees Jaffree may conduct a moment of silence under its authority. Nor is there any question that defendant Julia Green conducted a moment of silence for permissive prayer or meditation daily in the class of Appellee Aakki Jaffree from May until the date of the trial in November 1982.[8] There is no dispute that Appellee Aakki Jaffree participated in this exercise. Nor is there any question that Appellee Ishmael Jaffree objected to these exercises, which he characterized as "religiously based prayer activities." (J.A. 25)

Finally, Appellants Smith urge that under the above set of facts, this Court immediately and definitively can determine the legal rights of the parties. The Court may determine, as did the appeals court below, that Appellees Jaffree have a constitutional right to enjoin the State of Alabama from permitting its teachers to conduct a moment of silence. Or it may find, as did the trial court, that the accommodation of rights of other students and teachers in the free exercise of their religion under the authority of God and the first amendment prohibits such an injunction in favor of appellees.

CONCLUSION

For the reason that this case meets the criteria of *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) and the evidentiary and implementation tests discussed in the first part of this brief, appellants ask this Court to find that a justiciable controversy exists under Article III, section 2 of the United States Consti-

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[8] Several of the teachers testified that they would be forced to choose between continuing their employment and following their religious beliefs if they were prohibited from praying at school. (T. 84, 664). Since the appellate court has prohibited teachers from praying verbally in class, *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983) (J.S.A. 1a), it is presumed that the teachers are now praying silently in class.

tution, even as the district court below found in *Jaffree v. James*, 544 F. Supp. at 730. (J.S.A. 68d)

Respectfully submitted,

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